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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 SAID FARZAD,

11 Petitioner,

12 v.

13 SNOHOMISH COUNTY SUPERIOR
14 COURT,

15 Respondent.

CASE NO. C17-1805-MJP-BAT

ORDER ADOPTING REPORT AND
RECOMMENDATION;
MODIFYING CASE CAPTION;
AND GRANTING WRIT OF
HABEAS CORPUS

16 THIS MATTER comes before the Court on Respondents' Objections (Dkt. No. 28) to the
17 Report and Recommendation of the Honorable Brian A. Tsuchida, United States Magistrate
18 Judge. (Dkt. No. 27.) Having reviewed the Report and Recommendation, the Objections, the
19 Response (Dkt. No. 30) and all related papers, the Court ADOPTS the Report and
20 Recommendations and GRANTS Petitioner's 28 U.S.C. § 2241 Petition.

21 **Background**

22 The relevant facts and procedural background are set forth in detail in the Report and
23 Recommendation. (Dkt. No. 27.) Respondents raise three objections to the Report and
24 Recommendation: (1) Respondents object to Magistrate Judge Tsuchida's conclusion that the

1 state court proceedings violated Petitioner Said Farzad’s Double Jeopardy rights, and object to
2 the recommendation that Petitioner’s habeas corpus petition be granted; (2) Respondents object
3 to the inclusion of Respondents Mark Roe and Robert Ferguson in the caption of the Proposed
4 Order and Proposed Judgment; and (3) Respondents contend that Petitioner is required to
5 exhaust state remedies. (Dkt. No. 28 at 1-2.)

6 **Discussion**

7 **I. Legal Standard**

8 Under Federal Rule of Civil Procedure 72, the Court must resolve de novo any part of the
9 Magistrate Judge’s Report and Recommendation that has been properly objected to and may
10 accept, reject, or modify the recommended disposition. Fed. R. Civ. P. 72(b)(3); see also 28
11 U.S.C. § 636(b)(1).

12 **II. Respondents’ Objections**

13 **A. Double Jeopardy**

14 Respondents object to the Report and Recommendation’s finding that Petitioner’s retrial,
15 after the jury was unable to reach a verdict on Count I, violated Double Jeopardy. (Dkt. No. 28
16 at 2-5.)

17 The Report and Recommendation indicate that, while the jury expressly declared that
18 they were deadlocked as to Count II, they did not do so as to Count I. (Dkt. No. 27 at 7-8.) The
19 trial court did not make further inquiry or finding as to whether the jury was deadlocked on
20 Count I. (Id. at 8.) Respondents contend that when Petitioner rejected the trial court’s offer to
21 do so, he “acquiesced” in the jury’s discharge and provided “implied consent” such that retrial
22 was permitted. (Id. at 3.)
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1 After review of the Report and Recommendation and all related papers, the Court
2 concludes that Petitioner's retrial violated Double Jeopardy. In Brazzel v. Washington, the Ninth
3 Circuit held that "[a]n implied acquittal occurs when a jury returns a guilty verdict as to a lesser
4 included or lesser alternate charge, but remains silent as to other charges, without announcing
5 any signs of hopeless deadlock." 491 F.3d 976, 981 (9th Cir. 2007). That is precisely what
6 occurred here. Petitioner's failure to affirmatively request that the trial court question the jurors
7 as to whether they were genuinely deadlocked on Count I does not constitute "acquiescence" or
8 "implied consent" allowing for retrial. Further, contrary to Respondents' suggestion, Petitioner's
9 agreement to the use of the "failure to agree" instruction does not constitute "waiver" of the
10 implied acquittal as this is the proper instruction in Washington. Daniels v. Pastor, No. C09-
11 5711BHS, 2010 WL 56041, at *4 (W.D. Wash. Jan. 6, 2010) (citation omitted).

12 The Court concludes that Petitioner's retrial on Count I violated Double Jeopardy.

13 **B. Dismissal of Mark Roe and Robert Ferguson**

14 Respondents object to the Report and Recommendation's inclusion of Respondent Mark
15 Roe and Robert Ferguson on the Proposed Order and Judgment. (Dkt. No. 28 at 5.) Magistrate
16 Judge Tsuchida recommended that these Respondents be dismissed from the action, as neither
17 has custody over or supervises Petitioner. (Dkt. No. 27 at 5-6); see also Rumsfeld v. Padilla, 542
18 U.S. 426, 434 (2004) (quoting 28 U.S.C. § 2242).

19 The Court concludes that Respondents Roe and Ferguson should be dismissed from this
20 action, and modifies the caption on the Proposed Order and Proposed Judgment, entered
21 herewith, accordingly.

1 **C. Exhaustion of State Remedies**

2 Respondents object to the Report and Recommendation’s finding that Petitioner need not
3 exhaust state judicial remedies before claiming Double Jeopardy in federal court. (Dkt. No. 28 at
4 5-6.) In its Order staying further proceedings and sentencing, the Court previously found that,
5 under the precedent established by State v. Glasmann, 183 Wn.2d 117, 119 (2015), it was
6 “highly unlikely” that Petitioner would succeed on his Double Jeopardy claim in state court, such
7 that requiring him to exhaust his state judicial remedies would be “futile.” (See Dkt. No. 26 at 5-
8 6.)


9 The Court concludes that, for the reasons discussed in its prior Order, futility dispensed
10 with the exhaustion requirement in this § 2241 case.

11 **Conclusion**

12 The Court, having reviewed the Report and Recommendation of United States Magistrate
13 Judge Brian A. Tsuchida, the Objections, the Response, and all related papers, ORDERS as
14 follows:

- 15 (1) The Report and Recommendation is ADOPTED;
- 16 (2) The case caption is AMENDED to remove Respondents Mark Roe and Robert Ferguson;
- 17 (3) The 28 U.S.C. § 2241 petition (Dkt. No. 5) is GRANTED. Further proceedings against
18 Said Farzad on the charge of Felony Telephone Harassment in Snohomish County Case
19 No. 14-1-01917-8 would violate the Double Jeopardy Clause and are prohibited, and;
- 20 (4) The Clerk of Court is directed to send copies of this Order to the Snohomish County
21 Superior Court, to Judge Tsuchida, and to all counsel.
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1 Dated May 3, 2018.

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4 Marsha J. Pechman
5 United States District Judge
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